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NO.

Supreme Court, U.S.
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IN THE

Supreme Court of The United States

OCTOBER TERM, 1992

MARVINELL BROWN,

Petitioner,

v.

HOUSTON INDEPENDENT SCHOOL DISTRICT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Petitioner is entitled to a writ of certiorari.

II. Whether the trial court and the Fifth Circuit Court of Appeals properly granted and affirmed summary judgment for the Respondent, based upon the insufficiency of the Petitioner's claims as a matter of law.

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SUMMARY OF ARGUMENT

I. The Petitioner is not entitled to a writ of certiorari. Certiorari is granted only for the purpose of resolving unsettled, unique or unusually significant questions of law. The Petitioner's case involves well-settled principles of law that were properly applied by the courts below. The Petitioner's request for a writ of certiorari should be denied.

II. The Petitioner's claims all fail as a matter of law, and the courts below properly granted and affirmed summary judgment for the Respondent.

Specifically, the Petitioner received notice and an opportunity to be heard concerning her referral for medical

evaluation; thus, her due process claim fails. Her claim under 42 U.S.C. § 2000e et seq. (Title VII) is without merit because it was not timely asserted. The Petitioner's first amendment retaliation claim fails because the allegedly protected speech related only to a matter of private, rather than public, concern.

The Respondent was likewise entitled to summary judgment on the residual claim raised by the Petitioner, namely "reasonable basis for referral," which is not a legally cognizable claim upon which relief may be granted. Thus, the Respondent was clearly entitled to judgment as a matter of law on all legal claims raised in the Petition for Writ of Certiorari.

ARGUMENT AND AUTHORITIES

I. PETITIONER IS NOT ENTITLED TO A WRIT OF CERTIORARI

Rule 10 of the Rules of the United States Supreme Court specifies that a petition for writ of certiorari will be granted only when there are special and important reasons therefor. No such reasons are presented in this case. Certiorari is generally granted to resolve a split of authority among the circuit courts of appeal, or to resolve major unsettled questions of federal law. In contrast, the law governing the Petitioner's case is well-settled, and her case was properly disposed of by the trial court and the Fifth Circuit Court of Appeals.

This Court exists to serve as the final arbiter of important questions of major legal significance. Watt v. Alaska, 451 U.S. 259, 101 S.Ct. 1673 (1981), fn. 5. It is irrelevant that a question is of importance to a particular party; this Court limits its review to questions of broad importance. Rice v. Sioux City Cemetery, 349 U.S. 70, 75 S.Ct. 614 (1955). There are no questions of broad importance presented in this case, nor are there any difficult or unsettled questions of law.

The courts below acted in accordance with Supreme Court and other legal precedent in granting and affirming summary judgment for the Respondent. An examination of the record demonstrates

that the trial court and the Court of Appeals followed standard judicial procedure in handling this case, and correctly found that the Respondent was entitled to summary judgment as a matter of law on all issues. It is inappropriate to grant a writ of certiorari in this matter, and the Petitioner's request should be denied.

II. THE PETITIONER'S CLAIMS FAIL AS A MATTER OF LAW:

A. DUE PROCESS

The Petitioner alleges that she has been deprived of property and liberty under the due process clause of the United States Constitution. Specifically, she claims that in the process of being placed on medical health leave, she was deprived of property

without constitutionally sufficient procedural safeguards to contest the alleged deprivation.

The seminal case in this area is Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487 (1985). In Loudermill, this Court held: "A tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." 105 S.Ct. 1487, 1495.

Furthermore, this Court has held that the judgments of local school officials in making personnel decisions should be given great deference, so long as some type of pre-suspension or

termination process is provided to affected employees. The Court held in Wood v. Strickland, 420 U.S. 76, 95 S.Ct. 992 (1975): "It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion." 95 S.Ct. 992, 1003.

In the present case, the Petitioner was given more due process than was constitutionally required prior to being placed on medical health leave. (R., p. 167-168). The summary judgment evidence demonstrated that the Respondent provided the Petitioner with notice of the proposal to place her on medical health leave, an explanation of the reasons for this action, and the opportunity to

respond to the allegations. In its order affirming the granting of summary judgment to the Respondent, the Fifth Circuit stated:

> Ms. Brown was given notice of the reasons for her referral and her subsequent placement on health leave. She was afforded the opportunity to give Dr. Glass her perspective on the events leading to the concern for fitness to teach. She was allowed to present evidence to Dr. Glass, and we note that Dr. Glass acknowledged that if Ms. Brown pursued evaluation further, then a third psychiatric opinion might have been warranted. In short, she was given pretermination notice and hearing, and the HISD acted reasonably. (Petition for Writ of Certiorari, p. A-8.)

The Respondent was entitled to summary judgment on the Petitioner's due process claim in accordance with Loudermill and the other precedents of

this Court. There is no basis to grant certiorari on this issue.

B. FIRST AMENDMENT - FREE SPEECH RETALIATION

The Petitioner claims that she was retaliated against for exercising her first amendment right to free speech. The Petitioner's first amendment claim was not asserted in her pleadings, and thus was not addressed by the trial court because it was not properly before the court. The Fifth Circuit was not obligated to consider the merits of this claim. In Singleton v. Wulff, 428 U.S. 106, 96 S.Ct. 2868 (1976), this Court stated: "It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below." 96 S.Ct. at 2877.

However, out of an abundance of caution the Fifth Circuit chose to address the merits of the Petitioner's first amendment claim, and properly found that it had no legal merit. The Petitioner's reliance upon Pickering v. Board of Education, 391 U.S. 572, 88 S.Ct. 1731 (1968) and Mount Healthy City Board of Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568 (1977), is without foundation. The Pickering and Mount Healthy cases both dealt with college teachers who were speaking on matters of public concern. Only speech based on matters of public concern is protected by the first amendment. See Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1684 (1983). In contrast, the speech that the

Petitioner claims led to retaliation related to her private concerns about the terms and conditions of her employment.

Specifically, the Petitioner claims that she was retaliated against after she called the Houston Police Department to complain about a negative evaluation. A complaint about a job evaluation places the Petitioner's speech squarely within the category of private concern. In its opinion, the Fifth Circuit stated the following:

> Even if we assume that the matters that moved Ms. Brown to call the police were matters of public concern, complaining about them to the police is communication that is of a private nature. Her First Amendment claim is therefore without legal merit. (Petition for Writ of Certiorari, p. A-9)

The Fifth Circuit correctly found that the Petitioner failed to state a viable first amendment claim under Connick v. Myers, supra. There is no basis for this Court to reconsider this first amendment issue, and her petition on this issue should be denied.

C. EQUITABLE TOLLING: RIGHT-TO-SUE

The Petitioner contends that the courts below should have considered her racial discrimination and retaliation claim under 42 U.S.C. § 2000e, et seq. (Title VII). The trial court properly did not consider this claim, because it was not raised in a timely fashion by the Petitioner. The Petitioner obtained two right-to-sue letters from the Equal Employment Opportunities Commission

(EEOC), dated September 6, 1988 and June 21, 1989. Only the first letter was filed with the trial court as part of the summary judgment record. Taking only this letter into consideration, the trial court found that the Petitioner's Title VII claim was untimely because it was not raised with the requisite time period after the issuance of the right-to-sue letter. (R., p. 50). The trial court granted summary judgment based on the first letter on January 16, 1991; the second right-to-sue letter relating to the Petitioner's Title VII claim was not filed with the court until <u>after</u> the granting of summary judgment. (Supp. R.). The trial court properly refused to consider the second right-to-sue letter.

The law requires that the issues raised in a right-to-sue letter be asserted within ninety (90) days from the date the letter is issued. 42 U.S.C. § 2000e, et seq. The timely assertion of claims arising from a right-to-sue letter is a jurisdictional prerequisite. See Shelley v. Bayou Metals, 561 F.2d 1209 (5th Cir. 1977). The Petitioner did not present the second right-to-sue letter to the trial court until approximately sixteen (16) months after issuance of the letter to her by the EEOC (Supp.R.), belated by any measure of time.

The Petitioner's reliance upon Zipes v. Transworld Airlines, Inc., 455 U.S. 393, 102 S.Ct. 1132 (1982) is misplaced. This case does not address in any way the

failure to file or timely present the issues raised in a right-to-sue letter with the trial court.

Furthermore, the summary judgment evidence submitted in this case established: (1) that the Petitioner was referred for medical evaluation for good cause, and (2) that the actions against the Petitioner had nothing to do with her race. (R., p. 152-154, 158-160). The Petitioner offered no summary judgment proof rebutting this evidence. She did not establish a prima facie case of racial discrimination or retaliation under McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973). Thus, even if the Appellant had met the procedural requirement of timely filing

her right-to-sue letters with the trial court in a timely manner, she would not have evaded summary judgment. The Fifth Circuit properly upheld this conclusion, and this Court should not reconsider this issue.

D. CREDIBILITY ASSESSMENTS FOR SUMMARY JUDGMENT

This portion of the Petitioner's petition is somewhat unclear, but the Respondent will assume that the Petitioner claims the trial court below improperly granted summary judgment despite contested fact issues concerning her credibility assessments. This argument has no merit. The Petitioner attempts to create a fact issue concerning "conflicting psychiatric reports" regarding her placement on

medical health leave. This argument basically restates a portion of the Petitioner's due process argument, which is discussed above. For the sake of clarity, however, a brief synopsis of the due process provided to the Petitioner follows.

Dr. Mattye Glass, a psychiatrist employed by the Respondent, originally made the recommendation that the Petitioner be placed on medical health leave. The Petitioner was allowed to respond to this recommendation by obtaining an evaluation from another psychiatrist. (R., p. 177-178). The Petitioner was evaluated by Dr. Estelle Robinson, an independent psychiatrist chosen by the Petitioner herself. Dr.

Robinson also recommended that the Petitioner be placed on medical health leave. (R., p. 261). Based on this independent evaluation, the Petitioner was placed on medical health leave. (R., p. 182).

The "conflicting psychiatric report" that the Petitioner refers to is the result of psychological testing that the Petitioner took under the supervision of a clinical psychologist and his associates. The psychologist reported that the Petitioner's test results were not abnormal, but further stated that the results were "based solely on on one clinical examination and testing, and does not include information from other sources which may provide additional

insight into this situation." (R., p.253). The HISD's decision to keep the Petitioner on medical health leave despite this limited psychological report does not constitute a violation of the Petitioner's due process rights.

Under Wood v. Strickland, supra, the trial court properly declined to second-guess the HISD's decision to place the Petitioner on medical health leave. The only relevant inquiry concerning the Petitioner's psychiatric evaluations is whether the Petitioner was given the notice and opportunity to respond required by the Due Process Clause. The Petitioner was provided with all of the process due her; her petition on this issue should be denied.

CONCLUSION

The trial court correctly rendered summary judgment in this case, and the Fifth Circuit concurred. The record clearly demonstrates that none of the causes of action asserted by the Petitioner are legally sufficient to survive summary judgment. Furthermore, this case presents no unique, important or unsettled questions of law which justify review by this Court. Accordingly, the Respondent respectfully requests that the Court deny the Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari has been forwarded to the Petitioner, by placing a copy of same in the United States Certified Mail, Return Receipt Requested, on this 21st day of July, 1992, addressed as follows:

Ms. Marvinell Brown
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I further certify that I received the Petitioner's Petition for Writ of Certiorari on June 26, 1992, by hand delivery.

Jeffrey J. Horner
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